

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WINDWOOD DEVELOPMENT, LLC,

Plaintiff,

v

CHARLES L. PELLE, Y,  
d/b/a PELLE, EXCAVATING,

Defendant / Third-Party Plaintiff-  
Appellant.

v

ABONMARCHE CONSULTING, INC.,

Third-Party Defendant-Appellee.

UNPUBLISHED

June 12, 2003

No. 237990

Berrien Circuit Court

LC No. 1998-003720-CK

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Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Third-Party Plaintiff Charles Pelley appeals as of right the trial court's grant of Third-Party Defendant Abonmarche Consulting, Inc.'s motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

**I. Background Facts and Procedural History**

This case arises out of the development of a residential subdivision known as Windwood Estates. Windwood Development, L.L.C., the owner of Windwood Estates, retained Abonmarche to act as the engineer of the project. Pursuant to the contract between Abonmarche and Windwood, Abonmarche was required to design the layout of the streets and utilities and act as Windwood's representative during the construction phase. Thereafter, Windwood entered into an agreement with Pelley to construct the roadway, storm sewer, sanitary sewer, and watermain for the subdivision. Pelley was also an investor in the project. There was no contract between Pelley and Abonmarche.

After Pelley began construction of the sewer lines, it orally informed Windwood and Abonmarche that the existing soil (consisting mostly of heavy wet clay) would be inadequate to

backfill the pipeline.<sup>1</sup> However, Pelley was informed that Windwood would not pay extra for any off-site soil to be brought in for backfill.<sup>2</sup> Pelley claimed that Abonmarche subsequently instructed it to use the existing soil despite the fact that it did not conform to the contract's requirements. Abonmarche denies this claim and asserts that it only informed Pelley of Windwood's refusal to provide additional money for off-site material. Pelley utilized the existing soil to backfill the pipelines. As a result, the sewer lines failed the township's inspection and Windwood was forced to hire another contractor to make the necessary repairs. Windwood consequently withheld payment and filed suit against Pelley for breach of contract.

On August 12, 1999, Pelley filed its first third-party complaint against Abonmarche for breach of contract/quasi-contract and as a third party beneficiary. Pelley essentially asserted that he relied upon Abonmarche's instructions to complete the project and fulfill his contract obligations with Windwood. The complaint states that Pelley informed Abonmarche of the poor soil conditions, but that Abonmarche instructed him to finish the project with the existing soil. The complaint further indicates that Abonmarche neglected to have the site inspected as each phase of the project was completed. According to the complaint, the delay in inspections caused additional expense that could have been avoided. Thus, the complaint provides that any damages Windwood suffered were due to Abonmarche's actions. The complaint also asserts that Pelley was a third-party beneficiary of the contract between Abonmarche and Windwood.

After conducting a hearing, the trial court determined that Pelley could not recover under a quasi-contract because there were express contracts covering the same subject matter. The trial court further determined that *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425; 543 NW2d 31 (1995), was dispositive of defendant's third-party beneficiary claim. The trial court issued a subsequent supplemental opinion to specifically address Pelley's assertion that a contract was created by Abonmarche's actions. In its opinion, the trial court found that Abonmarche's actions "did not exceed the scope of their duties enunciated within the four squares of the contract." The trial court specifically noted the provisions in the contract limiting Abonmarche's responsibilities and duties with regard to Pelley. Accordingly, the trial court determined that Abonmarche could not be held liable for breach of contract.

On November 13, 2000, Pelley brought another third-party complaint against Abonmarche for negligence. According to this complaint, Abonmarche voluntarily assumed a duty to instruct Pelley in a reasonable and proper manner when it stepped outside the contract

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<sup>1</sup> The contract describes "backfill" as the soil, placed on top of the pipe-bedding material, that fills the trench above the newly laid pipe. Contract Specifications, § 02221. According to the contract, "[e]xcavated material may be used as backfill provided that such material consists of loam, clay or other materials which, in the judgment of the ENGINEER, are suitable for backfilling." Contract Specifications, § 02221, Part 2, 3.01(E).

<sup>2</sup> Pelley's contract with Windwood required him to include the costs for backfilling the trenches in his bid. Contract Specifications, § 02221, Part 1, 1.02. The contract further instructs the contractor to notify the owner and engineer in writing about any differing subsurface conditions. General Conditions, Art 4, § 4.2.3. The contract states that the contractor shall not "disturb such conditions or perform any Work in connection therewith . . . until receipt of written order to do so." General Conditions, Art 4, § 4.2.3.

and began regularly instructing and overseeing Pelley's work. The complaint asserts that Abonmarche breached this duty when it instructed Pelley to backfill the pipelines with improper soil. The complaint states that Abonmarche further breached its duty by failing to have the project inspected by the township as each phase was completed. If Abonmarche permitted Pelley to order the proper soil or had the site inspected before Pelley completed the project, the complaint states that the damages suffered would have been significantly reduced.

Hearings on this motion were conducted on June 4, 2001 and June 29, 2001. The trial court acknowledged that a negligence action could be raised regardless of privity of contract. However, the trial court further concluded that the case law supporting this proposition was based on situations where the tortfeasors acted outside of their contracts. The trial court noted that the contract between Pelley and Windwood was explicit regarding the authority and responsibilities of the project engineer. For example, the contract provided that Abonmarche would not be responsible for Pelley's failure to perform the work pursuant to the contract. General Conditions, Art 9, § 9.13.2. The trial court also highlighted the fact that the contract required any amendments to the Abonmarche's duties to be made in writing. Thus, even assuming that Abonmarche was on the worksite daily and instructed Pelley to use improper materials, the trial court concluded that it was insufficient to modify the terms of the contract.

## II. Legal Analysis

On appeal, Pelley asserts that the trial court erred when it granted Abonmarche's motions for summary disposition on each of his complaints. A trial court's denial of a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Issues concerning the proper interpretation of a contract are also reviewed de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co*, *supra* at 397.

### A. Breach of Contract / Quasi-Contract

It is undisputed in this case that Pelley and Abonmarche never entered into a contract with each other. However, both Pelley and Abonmarche had express contracts with Windwood governing their duties during the construction of the subdivision. Pelley's contract with Windwood also defined Abonmarche's responsibilities toward Pelley throughout the project. Case law clearly provides that a contract will only be implied in situations where "there is no express contract covering the same subject matter." *Barber v SMH (US), Inc*, 202 Mich. App. 366, 375; 509 NW2d 791 (1993). Moreover, a quasi-contract will only be created where the defendant received a benefit and an inequity resulted to the plaintiff because the defendant retained such benefit. *Id.* Pelley failed to indicate in his appellate brief what benefit, if any, that

Abonmarche received from its alleged control over Pelley. Thus, the trial court did not err in dismissing Pelley's breach of contract / quasi-contract claim.

### B. Third-Party Beneficiary

Pelley next asserts that it should benefit from the contract between Windwood and Abonmarche as a third party because it was an investor in the project. We disagree.

Pursuant to MCL 600.1405(1), "[a] promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." Whether parties to a contract intend to confer a benefit on a third party is determined by objectively examining the contract. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998). Where a contract is for the primary benefit of the parties to the contract, a third person that incidentally benefits does not acquire the rights of a third-party beneficiary. *Id.*

In *Dynamic*, *supra* at 428, this Court concluded that "[c]ontractors, subcontractors, and their employees are generally held not to be the third-party beneficiaries of the contract between the general or supervisory contractor and the project owner." Rather, contractors are considered to be merely incidental beneficiaries of such a contract. *Id.* at 430. Pelley has failed to show that the instant case is distinguishable from *Dynamic*. Moreover, Pelley has failed to establish that the contract between Abonmarche and Windwood was made directly for his benefit as an investor in the project. See *First Security Savings Bank v Aitken*, 226 Mich App 291, 309; 573 NW2d 307 (1997); *rev'd on other grounds Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (holding that investors could not acquire standing as third-party beneficiaries because they failed to show that the contract was made directly for their benefit).

### C. Negligence

Pelley ultimately argues that Abonmarche should be held liable for the failed sewer line because it negligently instructed Pelley to utilize inferior material to complete the project. We disagree.

A prima facie negligence claim requires a party to establish: "(1) a duty; (2) breach of that duty; (3) proximate cause; and (4) damages." *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002). This Court has previously determined that a contractor may maintain an action in tort against a project engineer "where he is injured by the defendant's negligent performance of contract even where there is no privity between the parties." *National Sand, Inc v Nagel Construction, Inc*, 182 Mich App 327, 331; 451 NW2d 618 (1990). In *National Sand*, this Court concluded that questions of material fact existed concerning whether the contractor was injured as a result of the project engineer's plans. *Id.* at 330-331. The project engineer in that case failed to account for the lack of clay on the construction site in its original plan and the contractor was forced to incur additional expenses as a result. *Id.* at 330. As noted in *Bacco Construction Co v American Colloid Co*, 148 Mich App 397, 416; 384 NW2d 427 (1986), "an engineer's failure to make proper calculations and specifications for a construction job may create a risk of harm to the third-party contractor who is responsible for applying those specifications to the job itself." Specifically, this harm may include any financial hardships that the contractor endures to cure the defects. *Id.*

In the instant case, however, Pelley admitted in his deposition testimony that Abonmarche was not negligent in its specifications for the job. Rather, Pelley's argument centers on his claim that Abonmarche undertook additional duties and then negligently performed these duties. However, Pelley's contract with Windwood provides that, "[t]he duties and responsibilities and the limitations of authority of ENGINEER as OWNER's representative during construction are set forth in the Contract Documents and shall not be extended without written consent of OWNER and ENGINEER." General Conditions, Art 9, § 9.1. According to this contract, the engineer lacked authority or responsibility over the contractor but was expected to visit the worksite to ensure the quality of the work. General Conditions, Art 9, § 9.2. Specifically, the contract stated that:

Neither ENGINEER's authority or responsibility under . . . the Contract Documents nor any decision made by ENGINEER in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise or performance of any authority or responsibility by ENGINEER shall create, impose or give rise to any duty owed by ENGINEER to CONTRACTOR . . . .  
[General Conditions, Art 9, § 9.13.]

The contract clearly indicated that Abonmarche was not responsible for Pelley's acts or omissions during the completion of the project.

A modification of a written contract, "requires proof that the parties knowingly, voluntarily, and mutually agreed to new obligations." *St Clair Intermediate School Dist v Intermediate Ed Ass'n / Michigan Ed Ass'n*, 458 Mich 540, 571; 581 NW2d 707 (1998). Abonmarche acknowledges that it acted as Windwood's representative during the construction period. However, even assuming that Abonmarche visited the worksite daily and instructed Pelley to use improper soil, Pelley has failed to indicate a knowing and mutual agreement to alter the terms of the written contract regarding Abonmarche's duties or responsibilities. Absent proof that Abonmarche owed Pelley any duty under the contract, Pelley cannot establish negligence. Therefore, the trial court properly granted Abonmarche's motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper

/s/ Karen M. Fort Hood